

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION No.9935 OF 2004.

1. The Secretary,
Late Sambhajirao Garad
Shikshan Prasarak Mandal
Mohol, Tal. Sholapur.
 2. The Principal,
Deshbhakt Sambhajirao Garad
Mahavidyalaya, Mohol
District Solapur.
- ..PETITIONERS.

Versus.

1. Ramesh Gajendra Jadhav,
residing at Vetawadi,
taluka Post Madha,
District Solapur.
2. The Registrar,
Shivaji University Kolhapur,
3. The Joint Director of Higher
Education Kolhapur Region,
Kolhapur.
4. Shri. Dnyaneshwar Shinde,
C/o Deshbhakt Sambhajirao Garad
Mahavidyalaya, Mohol,
District Solapur.

..RESPONDENTS.

Mr. G. S. Godbole, Advocate for the
Petitioners.

Mr. A. V. Anturkar i/b Mr. Dilip Bodake,
Advocate for the Respondent No.1.

Mr. R.G. Ketkar, Advocate for Respondent No.2.

Ms. V. S. Mhaisapurkar, A.G.P., for

Respondent No.3.

Mr. R. D. Soni i/b M/s. Ram & Co. for
respondent No.4.

CORAM:R.M.S.KHANDEPARKAR,J.

DATED:7TH DECEMBER, 2006.

ORAL JUDGMENT.

1. Heard the learned Advocates for the
parties.

2. Rule. By consent, the Rule is made
returnable forthwith.

3. The petitioners challenge the judgment
and order dated 21st July, 2004 passed by the
College Tribunal in Appeal No. 34 of 2002.
By the impugned judgment the College Tribunal
has allowed the Appeal filed by the respondent
no.1 and has directed the petitioners to
reinstate the respondent no.1 with effect from
15.9.2000 with full backwages.

4. Under the letter dated 7th November,
1998, the petitioners forwarded a draft
advertisement to the respondent no.2 for
filling up various posts including the post of
Lecturer for Geography in the College run by

the petitioners. The draft advertisement indicated the post of Lecturer for Geography as being reserved for the scheduled caste category. Under the letter dated 5th December, 1998 the University approved the draft with certain corrections and the post for Geography Lecturer was shown as part time post meant to be filled by a open category candidate. The petitioners accordingly published the advertisement in a newspaper on 11th December, 1998. Further by the letter dated 1st January, 1999 the University approved three posts of Lecturers including one full time Lecturer for Geography subject. The petitioners, thereupon sought clarification from the University under the letter dated 12th January, 1999, as the earlier approval was for part time post for Geography Lecturer, whereas the approval dated 9th December, 1999 disclosed full time post for Geography Lecturer. Meanwhile, in terms of the advertisement issued on 11th December, 1998 interviews were held for filling up the post of part time Lecturer in Geography and the respondent no.1 was selected for the said post on 3rd March, 1999 and a letter to that effect was also issued to the respondent no.1

specifying that it was a part time Lecturer's post in the subject of Geography and the appointment was subjected to the approval by the University. The respondent no.1 reported to the duties from 9th March, 1999. Under the letter dated 11th March, 1999 the University informed the petitioners that the earlier approval granted under the letter dated 9th December, 1998 was being cancelled and new advertisement should be issued disclosing the posts of Lecturers in English as well as Geography being full time posts reserved for scheduled caste Candidates. Under the letter dated 10th April, 1999, the University also called for explanation from the Petitioners for issuing the advertisement for part time Lecturer's post in Geography subject though the approval was given for full time Lecturer on clock hour basis. The same was replied by the Petitioner under the letter dated 21st April, 1999 bringing to the notice of the University its approval to the advertisement on 5th December, 1998. By another letter dated 21st May, 1999 the University was requested to grant its approval for the candidate already appointed as the part time Lecturer in terms of advertisement which was

approved by the University under letter dated 5th December, 1998. However, the University under letter dated 21st June, 1999 declined to grant approval to the appointment including that of the respondent no.1 and insisted for full time Lecturer being appointed in terms of the approval under the letter dated 1st of March, 1999. Under the letter dated 21st July, 1999 the petitioner reiterated its stand in the letter dated 21st May, 1999. However, the University declined to oblige the petitioners and called for explanation under letter dated 10th August, 1999. The petitioners thereupon under the letter dated 18th August, 1999 informed the respondent no.1 and the other Lecturer in English subject that their appointments were only on temporary basis and not on permanent basis.

5. The respondent no.1 thereupon made representation to the University on 29th September, 1999 alongwith the representation by the Lecturer in English subject, without any success. The respondent no.1 also preferred Writ Petition being W. P. No. 1689 of 2000 seeking to quash and set aside the letter dated 18th August, 1999 issued by

the petitioners to the respondent no.1 and other Lecturers and further to restrain the petitioners from restricting appointment of the respondent no.1 for the Academic Year 1999-2000, as also to direct the petitioners and the University to appoint the respondent no.1 on full time basis in the post held by him in the petitioners college. In that regard reliance was sought to be placed by the respondent no.1 on the Circular dated 30th June, 1999. The Division Bench of this Court by an order dated 22nd August, 2000 rejected the said Writ Petition observing that the petitioners claim for absorption as full time Lecturer on the basis of Circular dated 30th June, 1999 cannot be granted and further that the University had pointed out that Post was reserved for the Scheduled Caste Candidate and that, therefore, the said Circular had no application. Meanwhile, under the letter dated 24th December, 1999, the University granted approval for the appointment of the respondent no.1 as part time Lecturer in Geography for the Academic Year 1999-2000. Further under the letter dated 10th April, 2000 the University clarified that the approval earlier granted for part time

Lecturer for Geography was by mistake as the vacancy was for the full time Lecturer, and as special case the approval was granted only for a period of one year and that new appointment should be made by following the prescribed procedure. Accordingly the petitioners by following the prescribed procedure and after issuing advertisement, on selection being made, appointed the respondent no.4 as full time Lecturer in Geography with effect from 2nd January, 2001 subject to G.R. dated 13th June, 2000 and passing of NET-SET examination. The respondent no.4 joined his duties with effect from 2nd January, 2001. His appointment was approved by the University under the letter dated 2nd February, 2001. The respondent no.1 thereupon filed the Appeal before the College Tribunal on 14th March, 2002 which came to be allowed, while directing reinstatement of the respondent No.1 with effect from 15th September, 2000 with full back wages.

6. While assailing the impugned judgment, the learned Advocate appearing for the petitioners submitted that the findings arrived at by the College Tribunal about

initial appointment of the respondent no.1 being on probation and not in the Post meant for Reserved Category Candidate, is contrary to the materials on record and, therefore, warrants interference in writ jurisdiction. He further submitted that the records which were placed before the College Tribunal disclosed that the appointment of the respondent no.1 was not approved by the University beyond the Academic Year 1999-2000 and the Post which the respondent no.1 was sought to occupy by virtue of the Appeal filed before the College Tribunal was reserved for the Scheduled Caste Category candidate wherein the petitioners after following the procedure had already appointed the respondent no.4 and the said appointment was duly approved by the University. The appointment of the respondent no.1 was for one year in a post meant for the reserved category candidate. The same was made known to the respondent no.1 under the letter dated 11th of August, 1999 and it was sought to be challenged by the respondent no.1 by way of W.P. No. 1689 of 2000. However, there was no challenge in regard to the post which the respondent No.1 now sought to occupy and, therefore, the Appeal was clearly barred

by application of principle of constructive res-judicata, inasmuch as that all the points which were raised in the Appeal were deemed to have been raised and decided in the said Writ Petition.

7. He further submitted that the fact that the respondent no.1 was initially appointed as the part time Lecturer in Geography as a result of advertisement issued on 11th December, 1998 is not in dispute and considering the fact that the University had not approved such post after the Academic Year 1999-2000, there was no occasion for the College Tribunal to order reinstatement of the respondent no.1. He further submitted that the findings arrived at by the College Tribunal regarding the manipulation of the appointment order are also contrary to the materials on record inasmuch as that the fresh order was issued with the earlier date, obviously to put the record straight in view of the communication from the University and the same was brought to the notice of the respondent no.1 as it was in relation to his appointment and that, therefore, it could not have been said to be a manipulation of the

order of appointment.

8. The learned Advocate appearing for the respondent no.1, on the other hand, submitted that there is no dispute that the appointment of the respondent no.1 was by following the prescribed procedure and on ascertaining about his eligibility to occupy the post and accordingly the letter of appointment was issued to him on 3rd of March, 1999 which clearly disclosed that his appointment was on probation for a period of two years. The appointment letter nowhere disclosed that the appointment was on temporary basis or otherwise. He further submitted that the order in the Writ Petition No. 1689 of 2000 was in relation to claim of absorption as full timer instead of part timer and the subject-matter of the Appeal before the College Tribunal was totally different from the subject-matter of the adjudication in the said writ petition. The petitioners have failed to establish before the College Tribunal that the Post in question was indeed meant for reserved category candidate inasmuch as that inspite of specific direction by the College Tribunal, consequent to the

application filed by the Respondent no.1 to produce the original Roster, the petitioners had failed to produce such Roster before the College Tribunal and moreover, they have suppressed the said Roster even from this Court in this Petition. In that regard, attention was sought to be drawn to the Xerox copy of the Roster produced before the College Tribunal which according to the learned Advocate for the respondent no.1 did not disclose the true copy of the original Roster as the Xerox copy, but discloses certain portion of the original Roster having been erased and particularly from the column with reference to the names of the employees and remarks, and only after erasing the said portion, the Xerox copy thereof was obtained and produced before the College Tribunal. The learned Advocate for the respondent no.1, therefore, has submitted that the adverse inference should be drawn against the petitioners in that regard. The College Tribunal having passed the impugned order after taking into consideration all the materials on the record, it does not warrant interference in writ jurisdiction.

9. The learned Advocate for the respondent no.2 University has submitted that the University had never approved the appointment of the respondent no.1 as a permanent employee for the full time Post of Geography. He further submitted that the approval which was granted in relation to the Post of Lecturer for Geography in the petitioners' college was meant for reserved category candidate and that was specifically informed to the College. He further submitted that a perusal of the Writ Petition No. 1689 of 2000 would reveal that the same pertains to the grievances relating to termination of the services of the respondent no.1 consequent to the decision of the University that the post was a full time Lecturer in Geography meant for reserved category candidate and, therefore, the decision therein would be a bar for the respondent no.1 to agitate the same issue by way of Appeal before the College Tribunal and on that ground itself the Appeal was liable to be dismissed. In that regard, it was sought to be contended that the finding arrived at by the College Tribunal about the decision in W.P. No. 1689 of 2000, is contrary to the materials on record. He has also submitted

that no appointment of a Lecturer can be held to be valid unless approved by the University in terms of provisions under Statute of 1979 read with Section 42 of the Shivaji University Act, 1974.

10. Perusal of the order passed in W.P. No. 1689 of 2000 discloses that the Division Bench had rejected the Writ Petition observing that respondent no.1 herein (one of the petitioner therein) was working as the part time Lecturer and the petition was filed to seek absorption as full time Lecturer on the basis of a Circular dated 30th June, 1999. It was also observed that the University had pointed out that the Post was meant for reserved category candidate belonging to the Scheduled Caste and consequently the Circular would not apply to the matter in issue. Thereafter, while drawing attention to the decision of the Apex Court in **Dr. Suresh Chandra Verma and others Vs.The Chancellor, Nagpur University & Others, 1990 (4) S.C.C.55**, the respondent no.1 herein had requested for direction to the Respondents in the said petition to give opportunity of being heard to the respondent no.1 herein in terms of Section 76 of the Maharashtra

Universities Act which request was rejected on the ground that the provision comprised under Section 76 of the said Act applies to the University Teachers and not the College Teachers.

11. Apparently, no other point had been considered or dealt with in the said writ petition. It is not in dispute that the Appeal which was filed by the respondent no.1 before the School Tribunal was essentially about grievance pertaining to the alleged oral termination of his services by the petitioners. The learned Advocate for the petitioners and the respondent no.2 may be justified in contending that the memo of writ petition which was filed in the Petition No. 1689 of 2000 did contain various other contentions on behalf of the respondent no.1. However, the order dated 22nd August, 2000 passed in W.P. No. 1689 of 2000, nowhere discloses any reference to any point other than those referred above. It is not in dispute nor it can be disputed that the College Tribunal is the Competent Authority to deal with the issues arising out of an order of termination issued against the College

Lecturer. In other words, the most efficacious remedy which is available to a College Lecturer whose services are terminated is by way of an Appeal under Section 59(1) of the Maharashtra Universities Act, 1994 and such Appeal lies before the College Tribunal. Being so, the Competent Authority to deal with all the issues arising out of the order of termination of service of a college Lecturer is the College Tribunal in terms of the Maharashtra Universities Act, 1994.

12. Explanation IV of Section 11 of the Civil Procedure Code speaks of principle of constructive res-judicata, it provides that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in such suit. The expression "which might and ought to have been made ground of defence or attack" in the said Explanation, cannot be read ignoring the statutory provision which gives right to the aggrieved parties to agitate their grievances before special Courts or Tribunals. In case in hand, the statutory provisions entitle the aggrieved party to invoke the provisions of

the Maharashtra Universities Act, 1994 to seek redressal in relation to his grievances. Merely because such person had filed Writ Petition, it cannot be said that the point which such person is lawfully entitled to raise in an Appeal before the College Tribunal under such Statute could or ought to have been raised before this Court in writ jurisdiction and having failed to do so, the principle of constructive res-judicata would apply. It is not merely because of the failure of the party to raise the point in W.P. that such principle would apply to the subsequent proceedings and more particularly, when the statutory provisions entitle such person to raise the issues which are sought to be raised before the College Tribunal, specifically in terms of statutory provisions comprised under the Maharashtra Universities Act. On this count itself the contention about the applicability of the principle of constructive res-judicata is to be rejected, apart from the fact that the order dated 22nd August, 2000 nowhere discloses final adjudication of the issue which arose for consideration before the College Tribunal in the Appeal filed by respondent no.1.

13. Before dealing with all other contentions, it would be worthwhile to deal with the argument relating to the entitlement for adverse inference in favour of the respondent no.1 which is sought to be canvassed by the learned Advocate for the respondent no.1, on account of failure on the part of the petitioners to produce the original Roster either before the College Tribunal or even in this petition. Undoubtedly, the Roster is the best evidence to ascertain whether any Post is meant for reserved category candidate or not and the law in that regard is well settled. But the matters are not always to be decided only on the basis of failure on the part of a party to a proceedings to produce the best evidence, particularly when there is other evidence on record which could effectively decide the matter in issue. Merely because the party has failed to produce the best evidence that itself cannot be a justification to reject the claim of the party in a case where the party has taken care to produce other relevant evidence in relation to the issue in question. Of course, the credibility of such evidence

has to be ascertained and has to be established. At the same time, failure on the part of a party to produce the best evidence will certainly give some sort of weightage to the opponent's case while analysing the entire evidence on record. Bearing this in mind, one has to ascertain whether the findings arrived at by the College Tribunal are borne out from the record or not and whether they would warrant interference in exercise of writ jurisdiction under Article 227 of the Constitution. It cannot be disputed that the issue as to whether the post in question is meant for reserved category candidate or not is a most relevant issue and goes to the root of the matter.

14. A perusal of the impugned judgment nowhere discloses any analysis of the materials on record to ascertain whether the post in question was meant for reserved category candidate in accordance with the provisions of law. Indeed, as rightly submitted by the learned Advocate for the petitioner that the Tribunal appears to have been completely swayed by the arguments on the part of the respondent no.1 about the alleged

manipulation of the order of the appointment of the respondent no.1. It cannot be disputed that pursuant to the direction issued by the University, the petitioner no.1 issued a fresh order with the same date under which the original order of appointment was issued to the respondent no.1 and that undoubtedly may prima facie create impression about manipulation of records by the petitioner. However, the courts analysing the evidence on record cannot go on such prima facie impressions. The Courts, more particularly, the fact finding Courts have to analyse the entire materials on record in proper perspective before arriving at any finding. It was not sufficient for the Tribunal merely to look at the orders issued earlier and subsequent to the directions issued by the University and to make an observation about the alleged manipulation by busy brain of the respondent no.1 management. Before using such harsh words against the management, it was expected from the Tribunal, a detail analysis of the materials on record. Undoubtedly, the Tribunal has failed to perform its obligation in that regard.

15. It is pertinent to note that no appointment of a College Lecturer can be validly made unless the procedure prescribed under the provisions framed in that regard by the University has been followed and further the appointment is approved by the University. Being so, all the records pertaining to the appointment of a Lecturer in a College including the approval of the University are required to be scanned through before arriving at any final conclusion.

16. It cannot be disputed that in the case in hand, the University in no uncertain terms had informed the petitioners about the requirement of compliance of statutory provisions in relation to the appointment of a candidate i.e. the post of Lecturer in Geography and that the same had been reserved for the Scheduled Caste candidate. It is true that prior to such intimation, the petitioner had issued advertisement and even proceeded to select the candidate as the respondent no.1 and issued the appointment letter in his favour as a part time Lecturer. Appointment letter also disclosed that appointment was being made on probation and not on temporary

basis. However, it is not disputed nor it can be disputed that such appointment was subject to the approval by the University and in the absence of approval of the appointment by the University, the same does not create any right in favour of the respondent no.1 to such post. It is a matter of record that the respondent no.1 was neither appointed as full time Lecturer in Geography in a post which was reserved for the scheduled caste candidate, nor there was University approval for any such appointment of the respondent no.4. The approval, if any, had been only for the part time Lecturer's post and that too for the Academic Year 1999-2000. In the background of these facts which were totally overlooked by the Tribunal, it got totally swayed away by the contentions on behalf of the respondent no.1 herein about the alleged manipulation of the appointment order, and consequently proceeded to hold that on account of alleged manipulation, the management tried to convert open category post to reserved category post. I hasten to say at this stage that it is true that the management's failure to produce the original Roster and the Xerox copy produced on record do give rise to suspicion about erasing

of certain portion from the original Roster before a Xerox copy thereof was obtained. But at the same time, it is also a matter of record that the University in no uncertain terms had made it clear that the post was meant for reserved category candidate from scheduled Caste and the said fact was never under challenge either before the College Tribunal nor even sought to be disputed in this petition on behalf of the respondent no.1. Once the responsible authority dealing with the matter in question has held that post is meant for reserved category candidate and that is not sought to be disputed by placing on record any cogent material in support thereof, the doubt sought to be created about the copy of the Roster or claim for adverse inference on account of failure on the part of the management to produce the original Roster, loses significance.

17. It is not in dispute that the respondent no.1 does not belong to the Scheduled Caste category and on the contrary, it is a fact that he is the open category candidate. The records also disclose that the full time post of Lecturer in Geography in the petitioners'

college is meant for reserved category candidate. The records also disclose that the appointment of the respondent no.1 was as a part time Lecturer and it was approved by the University only for the academic year 1999-2000. Nothing is brought to my notice which could disclose any irregularity or illegality in the order of the University, restricting said approval for one year as was granted by the University in relation to the respondent no.1's appointment.

18. The learned Advocate appearing for respondent no.1 has strenuously argued that the Tribunal has taken due care to analyse the entire records to ascertain whether the appointment of the respondent no.1 was against the reserved post and has arrived at finding that the documents placed on record by the management showing the backlog do not carry any wait in the face of the Selection Committee's Report. Undoubtedly, the Tribunal having noted the main point which was required to be considered i.e. whether the appointment of the respondent no.1 was against the reserved category post or not, proceeded

to answer the said point merely by referring

to the Selection Committee's Report, advertisement issued by the Management and further the Xerox copy of the Roster. The Tribunal did not consider whether the proceedings to which elaborate reference was made, were in accordance with the provisions of law or not. The main point which was required to be addressed to the Tribunal before dealing with the report of Selection Committee was whether in the face of the facts placed on record and the law applicable to those facts, the Selection Committee's Report can at all be taken as a final word in the matter in hand. Indeed the Tribunal has proceeded to consider the Report by itself to be sufficient to substitute its own judgment on the point in issue. The Tribunal has observed that the Committee constituted of responsible persons and they had prepared report under their signatures and the report disclosed that the post of Lecturer in Geography was meant for open category candidate. It is pertinent to note that the Judgment apparently refers to the Selection Committee's Report dated 23rd February, 1999. Obviously, it was in relation to the advertisement issued on 11th December,

1998. As already seen above, the records apparently disclose that the proceedings for filling up the post in pursuance of the advertisement issued on 11th December, 1998 were not in consonance with the provisions of law nor the appointment so made was approved by the University. The impugned judgment nowhere discloses that the Tribunal having applied its mind to this aspect of the matter. The Tribunal was not expected merely to read and reproduce the contents of the Selection Committee's Report dated 23rd February, 1999 to decide as to whether the appointment of the respondent no.1 was validly made and whether the University had no justification to reject the approval for such appointment beyond the Academic Year 1999-2000. There does not appear any discussion on these points in the impugned judgment. Rather the Tribunal appears to have swayed away by the fact that at six places in special report by Dr. N.D.Jatratkar stated that the post for the Lecturer in Geography was meant for open category. That apart even while considering report, irrespective of the fact that it was prepared by the responsible persons like the representatives of Vice Chancellor, Experts of

the University, Director of Higher Education, etc. it was necessary for the Tribunal to ascertain whether the post for the Lecturer in Geography was really meant for open category candidate or not based on all the materials, including the materials placed in respect of the approval or disapproval granted in that regard by the University. The College Tribunal erred in exercise of its jurisdiction in that regard.

19. The findings arrived at by the Tribunal that the documents placed on record by the Respondent management revealed no backlog, and that the respondent no.1 was validly appointed in a permanent post and it was meant for open category candidate, are totally perverse and contrary to materials on record. The document of xerox copy of the Roster itself, was not sufficient to reject all the contentions which were sought to be raised on behalf of the petitioners and the respondent no.4, nor the Selection Committee Report dated 23rd February, 1999 could have been accepted as a gospel truth.

20. It is then sought to be contended that

no fault can be found with the respondent no.1 who had bonafide believed in the advertisement issued by the petitioners on 11th December, 1998 and had applied for the post and on being interviewed, was issued the order of the appointment and even the initial appointment disclosed that his appointment was on probation for two years which disclosed that the appointment was in permanent vacancy. Undoubtedly, there was a mistake on the part of the petitioners in that regard which was immediately brought to the notice by the respondent No.4.

21. Question then arises whether on account of mistake of the petitioners, can the respondent no.1 be penalized? It is well settled law that in case of entry in service it has to be a lawful entry. Any irregularity in that respect cannot create any vested right in favour of the employee illegally appointed, irrespective of the fact whether the fault in that regard lies with the employee or the employer. Otherwise, under the pretext of accusing the fault on the part of the employer, every employee seeking back door entry may illegally seek to regularize such

entry in the service. Being so, merely because there was a fault on the part of the petitioners in following the procedure, on that count the respondent no.1's services cannot be regularized. That will not enure to benefit of the respondent no.1 to contend that he cannot be penalized for the fault on the part of the petitioners in not following the proper procedure while filling up the vacancy in relation to the post of Lecturer in the subject of Geography. Infact, it is not a matter of penalizing the respondent no.1; rather the respondent no.1 cannot seek to regularize an illegal act to have benefit on the pretext that the fault lies with the petitioner in not following the regular procedure. The respondent no.1 is to be absolutely blamed for illegally availing the benefit of such acts on the part of the petitioner.

22. Hence, the impugned order cannot be sustained and is liable to be set aside. It cannot be held that the respondent no.1 was appointed for the Post of Lecturer in Geography meant for open Category candidate. No fault can be found with the orders passed

by the University in relation to the appointment of the respondent no.1 and hence the impugned order is liable to be set aside and the Appeal filed by the respondent no.1 to be dismissed. Rule is made absolute in the above terms with no order as to costs.

[R.M.S.KHANDEPARKAR,J]